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Summary record (partial)* of the 2611th meeting

Held at Headquarters, New York, on Tuesday, 24 March 2009, at 3 p.m.

Chairperson: Mr. Iwasawa

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* No summary record was prepared for the rest of the meeting.

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The meeting was called to order at 3.05 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant (*continued*)

Fifth periodic report of Australia (*continued*) (CCPR/C/AUS/5; CCPR/C/AUS/Q/5 and Add.1)

1. *At the invitation of the Chairperson, the members of the delegation of Australia took places at the Committee table.*

2. **The Chairperson** invited further queries from the Committee on questions 13 to 24 on the list of issues (CCPR/C/AUS/Q/5).

3. **Mr. Salvioli**, referring to question 16, said that the system of investigating, trying and providing compensation for wrongful imprisonment was not satisfactory. The concept of reparation was broader than mere economic compensation.

4. The State party's reservation to article 14, paragraph 6 seemed to refer to the legal basis for compensation. There was no incompatibility between providing compensation and the principles of international law. Any breach of international law resulting in damage generated compensation. The State's written answer to question 16 referred to the Commonwealth Ombudsman and to various human rights institutions, but those bodies could only make recommendations on reparations; they could not take decisions.

5. Police brutality complaints had been filed in virtually all the states and territories of Australia. They were usually resolved by bodies within the police force, and the police were rarely condemned or convicted. The State must develop a transparent, independent and efficient mechanism for handling complaints of police brutality and eradicating it. Information was requested on whether such a mechanism would be set up.

6. The State's answer to question 17 made clear its intention to comply with article 14 and indicated that there should be no explicit reservations thereto. Nor should there be implicit reservations, as those did not exist in international law. Reservations were formulated and construed in a restrictive fashion, in keeping with the principle of *effet utile*, especially in regard to international human rights treaties.

7. Paragraph 133 of the written replies (CCPR/C/AUS/Q/5/Add.1) stated that the courts could advise an individual regarding the consequences of using uncleared legal representation and recommend that the defendant engage a legal representative who had clearance. In the same context, paragraph 134 stated that uncleared legal representatives risked not having access to national security information relevant to the proceedings against their clients. That raised the questions of how it was possible to prepare an adequate defence, if an individual was practically compelled to change counsel, and how that was compatible with the principle of free choice of counsel, as stated in article 14.

8. Access to mental health care for detainees with mental illness was a matter of concern raised by many Australian non-governmental organizations. Degrading treatment, including segregation, might run counter to the provisions of the Covenant. Over the last 15 years, the states and territories had had policies of indefinite detention for those requesting political asylum. The Committee wished to know whether changes had already been made to immigration legislation to eliminate indefinite detainment.

9. The reopening of detention centres on Christmas Island was cause for concern. In particular, there was one new detention centre which appeared to resemble a maximum security prison.

10. **Mr. O'Flaherty** asked what the completion date would be for incorporation of non-refoulement obligations under the Covenant and the Convention Against Torture into the visa process.

11. Paragraph 157 of the replies stated that the Department of Immigration and Citizenship was consulting with stakeholders, including experts in refugee law. He would welcome an assurance that experts on the Covenant and the Convention Against Torture and experts from the Office of the United Nations High Commissioner for Refugees (UNHCR) were also being consulted.

12. The list of issues should have cited article 20 of the Covenant. That had been omitted through an oversight.

13. There was no federal religious vilification law, despite various failed legislative attempts. Only three states had such laws, and they engaged only with the public sphere. There appeared to be a legislative gap. It

should be pointed out that there was no intent to criminalize thought. References to "thought" in that context were misleading. Nor was the issue one of adopting a law on defamation of religion. However, certain extreme forms of expression should be criminalized, and articles 19 and 20 should be enforced.

14. The reservation to article 20 was interestingly worded, stating simply that the State party reserved the right not to introduce new legislation. The reservation had been entered 29 years ago. In the light of all the changes that had occurred in the world since then, that very dated reservation should be revisited. He hoped that the State would withdraw the reservation or exercise the right, retained under the reservation, to introduce new legislation to ensure that article 20 was adequately reflected in domestic law.

15. In paragraph 167 of its replies, the State had said that previous recommendations of the Human Rights and Equal Opportunity Commission on religious discrimination and freedom of belief would be revisited. It was not clear whether that meant that the Commission would change its position regarding criminalization at the federal level of discrimination and vilification on the basis of religion. He requested further information, as the Committee had no information before it suggesting that such criminalization might occur.

16. **Mr. Rivas Posada** noted with surprise and dissatisfaction that the State party's understanding of the reporting procedure was not consistent with established rules and long-standing practice not only of the Human Rights Committee, but of other treaty bodies as well. The various treaty bodies had achieved a consensus regarding streamlining and harmonization of reports to prevent repetition, inclusion of irrelevant information and excessive detail. The Committee had always been clear about how it carried out its work and met its obligations. The text of the Covenant needed to be taken into account, but so did tradition and long-standing practice in the work of the Committee. The Committee was interested not only in human rights protection, but also in progress in States' action to bolster respect for human rights. Obstacles which might have prevented a State party from fully complying with the conclusions and observations of the Committee must also be covered. The work of the Committee involved cooperation with States, not confrontation, in order to achieve progress towards comprehensive compliance with human rights obligations. In view of that, the Committee must be confident that it had the information necessary to make its observations and recommendations.

17. The State party had said orally and in writing that the report was experimental in nature. It was not a successful experiment, and there were disgruntled feelings in the Committee as a result. A display of goodwill by the State party required an overhaul of how the report was presented. If the Committee's opinions and conclusions were not taken into account, that would be tantamount to the Committee accepting reports which were parodies or caricatures.

18. **Sir Nigel Rodley** noted that the reply to question 13 included an assurance that immigration detention was used only as a last resort for the shortest practicable period, although legislation for mandatory detention remained in place. However, non-governmental organizations had said that that policy might not have trickled down: in practice, there were cases where, following health, security and identity checks, asylum-seekers were not released until removal from Australia or issuance of a permanent visa.

19. While fewer people were being held, and for shorter periods, months rather than years, detention was still arbitrary. Information received stated that as of September 2008, 281 people had been in immigration detention, with 109 of them in custody for 12 months or more, 69 in custody for 18 months or more and 42 in custody for two years or more. Detainees were still unable to challenge their detention in court. Information on how the policy was being implemented would be appreciated.

20. There were allegations that a young woman with a valid visa with all health and security checks in order had had her bags searched and her diary read; although she posed no threat to the community, she had been detained and then released after three months. Another case involved a report of three young Africans with valid visas, who had sought asylum before clearing immigration: for that reason their visas had been cancelled and they had been taken into detention. Also, five unaccompanied minors had been held for five weeks in a closed detention facility on Christmas Island. Children were not supposed to be detained, except as a very last resort, even for health, security

and identity checks. It would be helpful to know to what extent such cases reflected a policy weakness.

21. Under the Australian Security, Intelligence and Organization Act as amended, it appeared that people could be detained for up to seven days without coming before a judge, could be questioned in the absence of a lawyer and could be prohibited from contacting anyone. Their lawyers could be denied access to information about reasons for detention and detention conditions and treatment. Detainees were prohibited from revealing information related to their detention and could be detained for up to five years for violating that prohibition. Detainees' parents or guardians and lawyers could be detained for up to five years for divulging any information regarding the fact or nature of detention. There was no information that people had in fact been detained under such conditions, but it raised the question as to whether such provisions were truly necessary. They seemed excessive and were in violation of articles 7, 9 and 10 of the Covenant. Information would be appreciated as to the possibility that that legislation would be reviewed.

22. **Mr. Bouzid** asked if the Government of Australia intended to adopt a law against vilification or discrimination on the basis of religion. There was no such law at the federal level or in New South Wales, which was home to half of the Muslim population of Australia.

23. **Ms. Motoc** noted that Australia was one of the few countries to discuss the situation of indigenous women, a hidden and very sensitive topic in many countries. She wondered what areas still required attention in reference to indigenous people, what gaps remained and what issues continued to be sources of dissatisfaction for indigenous people.

24. **Mr. Fathalla**, commenting on paragraph 162 of the replies, which, referring to the Racial Discrimination Act, said that the terms "race" and "ethnic origin" were intended broadly and could cover particular religious groups. Race or ethnicity and religion should not be so linked, as people of the same ethnic background often professed different religions, while people of different races might profess the same religion. It would be preferable to have a clear reference to religious discrimination in the new legislation. Moreover, the reference in paragraph 162 to "particular religious groups" was not in conformity with article 20, paragraph 2, because the issue was in fact one of religion broadly.

25. **Ms. Wedgwood** stressed that the morally compelling, fundamental issue facing Australia was redress for what had been done to the Aborigines. It would take a generation to solve, but Australia had an obligation to see that every Aboriginal person could have the kind of life they wanted, whether that involved reviving traditional ways or true access to life in modern society.

26. **Mr. Illingworth** (Australia), replying to questions relating to immigration policies, said that the Christmas Island facility was governed by the usual Australian legal provisions that prevented unauthorized arrivals from applying for visas, unless they sought special ministerial intervention. The Covenant right of immigrants to seek protection was nonetheless safeguarded by the practical arrangements in place: asylum-seekers were assisted according to the same standards as in mainland immigration centres. The process on Christmas Island had been significantly strengthened by the new Government in terms of training and guidelines, natural justice, publicly funded professional assistance in submitting claims for asylum, and individual merit reviews of the decisions reached. If immigrants were found not to qualify for protection, they were not removed from the centre until their claims had been explored — a change from the previous "Pacific Strategy" of removal to other countries. The delegation had circulated copies of the ministerial document outlining the various immigration policy shifts. The new policies, adopted in July 2008, had been quickly implemented in law. The Christmas Island processes had time frames equivalent to those on the mainland, roughly about four to six months. Moreover, the High Court could hear complaints from individuals seeking redress for their treatment in the Christmas Island facility. The facility had been reopened for logistical reasons: many of the boat arrivals were accompanied by family groups, and that facility offered a greater range of less constraining options for housing them. Recently, most of the boat arrivals did seek protection and did receive it.

27. Mandatory detention decisions applied equally to immigrants on Christmas Island and on the mainland. Asylum-seekers were never detained as such. Indeed, most of the 4,000 asylum applicants per year were living in the community, often with work opportunities. Some, however, were being held because the grounds

on which they had obtained their entry visas were improper. The Government also detained those who arrived with no visa and could not be immediately cleared for immigration, not as a punitive measure but to allow time for the necessary health and security checks. There had been some detentions at the border and problems with unaccompanied minors on which he would obtain further information for the Committee. Generally, minors were held in the most accommodating environment possible, the residential arrangements on Christmas Island. Throughout the course of any detention, there was a statutory series of reviews, concluding with a review by the Ombudsman regarding the appropriateness of the detention.

28. The reference to consultation with "refugee experts" should of course be interpreted more broadly, to include consultations with the Human Rights Commissioner and the Human Rights Ombudsman, academics, community activists and international organizations such as UNHCR.

29. **Mr. Smith** (Australia) observed that the Prime Minister, going beyond the seminal apology to the "stolen generations" for events of the past, had indicated that the key was to move forward and address the injustices currently being committed against Australia's indigenous citizens, hence the ambitious Government commitment to closing the gap on indigenous disadvantage in the six target areas outlined in the written replies (CCPR/C/AUS/Q/5/Add.1) to the list of issues (para. 47). The first of the annual progress reports on how the gap was being closed had been made in February. At the moment the gaps were appalling: indigenous life expectancy was three times lower, child mortality rates twice as high, the educational disadvantages from 25 to 40 per cent higher, and unemployment rates three times higher.

30. A key component of achieving the targets was to re-establish the relationship with the country's indigenous Australians on a partnership basis, recognizing and celebrating indigenous culture and encouraging the formation of indigenous associations, and at the same time acting to address unacceptable patterns of behaviour against them.

31. **Ms. Nolan** (Australia), speaking of the safeguards against degrading treatment of prisoners, said that solitary confinement was always a last resort under the laws of the various states, and used only if necessary for the prisoner's own safety or that of others or for the good order of the prison. Those separated because of mental health problems had to be seen by a medical officer within 24 hours and regularly re-assessed. Those at significant risk of self-harm were placed in observation cells, which were usually single cells. As required by law, persons in solitary confinement did not have their diet, exercise, clothing or access to visitors reduced. Juvenile prisoners could be segregated for more than 24 hours only with the specific authorization of a senior prison official and a management plan, including visits by a psychologist, was mandatory. Comprehensive procedures were in place at the federal, state and territorial levels for all prisoners with mental health problems. In some cases, rather than being kept in isolation, they could be held in separate, secure mental health units that met the federal standards of the Mental Health Act of 1996. In general, the Corrective Service Act of 2006 established accountability mechanisms to ensure the well-being of segregated prisoners.

32. **Mr. Campbell** (Australia) said that the police did on occasion use tasers to subjugate suspects, as a less-than-lethal use of force, but generally sought to de-escalate a conflict before resorting to them. They were to be used only by expert officers who had received advanced training in their use and were re-certified annually. The notion of "reasonable force" underpinned all conflict-management strategies.

33. Western Australia did not intend to withdraw its mandatory sentencing laws, because they were deemed necessary. In fact, in the wake of a number of very serious assaults against the police, a bill had been introduced in the Western Australian parliament in December 2008 to amend the Criminal Code so as to mandate a 12-month prison sentence for anyone assaulting and causing bodily harm to a police officer.

34. He would not say that the delegation agreed entirely with Mr. Rivas Posada's characterization of Australia's report. However, he assured the Committee that it had been drawn up in good faith according to the Government's understanding of the guidelines at that time. The next report would be submitted in a different format.

35. Replies to any questions still unanswered would be sent to the Committee in writing as agreed.

36. **Sir Nigel Rodley** asked if the delegation could confirm that the policy of ruling that persons entering on an ordinary visa and applying for asylum at the

border had applied for the visa on improper grounds was under revision. Also, although he had been reassured by the statement that only highly trained police officers were allowed to use tasers, the information received from non-governmental organizations indicated that in fact that had not been the case in specific instances. Furthermore, using the test of "reasonable force" — which had been done in the past in the United Kingdom as well — could have very unfortunate results, because it did not carry with it the tests of necessity or proportionality. He hoped more information could be provided on that question.

37. **Mr. Campbell** (Australia), recalling that Australia wanted the kind of international engagement represented by its reports to the Committee, agreed that the dialogue had been rewarding and candid. Noting that Australia was the first to acknowledge the areas of disadvantage among its indigenous population especially, he expressed the hope that the delegation had conveyed the Government's firm commitment to redressing that situation. He also expressed appreciation to the Australian non-governmental organizations who had, very appropriately, brought their viewpoints to the Committee.

38. **The Chairperson** thanked the delegation of Australia for the detailed responses to the Committee's questions.

39. *The members of the delegation of Australia withdrew.*

The discussion covered in the summary record ended at 4.30 p.m.